

**In Confidence**

**Office of the Minister for the Environment**

**Chair, Cabinet Business Committee**

## **COVID-19 Recovery (Fast-track Consenting) Bill**

### **Proposal**

1. I seek approval to develop special legislation to support the recovery of New Zealand from the economic impacts of COVID-19. The proposed COVID-19 Recovery (Fast-track Consenting) Bill 2020 (the Bill) will enable acceleration of different sized and located infrastructure and other development projects, to provide certainty of ongoing employment and investment across New Zealand, while also achieving the Government's objectives for economic, environmental and social wellbeing.

### **Executive summary**

2. The COVID-19 pandemic crisis is causing serious economic and social disruption and its impact will be felt for several years. A recession is almost certain. Actions to specifically support our recovery are necessary.
3. The Government has an opportunity to support economic recovery through infrastructure and development projects that can commence rapidly. While standard resource consent processes under the Resource Management Act 1991 (RMA) adequately enable development in normal circumstances, they will not provide the speed and certainty needed during the COVID-19 recovery period. An urgent bespoke response is needed.
4. This is also an opportunity to support projects that will enable New Zealanders' future wellbeing, including our transition to a low-emissions, climate-resilient economy.
5. I propose processes that will provide the Government with new temporary powers to fast-track resource consenting and designation processes for specified development and infrastructure projects. To achieve this three levels of intervention are proposed:
  - a) list specific large-scale Government-led projects in the Bill
  - b) enable certain central and local government projects to occur as of right, provided specified criteria, such as capital value thresholds or land tenure requirements are met
  - c) provide a fast-track resource consenting and designation process for other publicly or privately led projects.
6. This paper has been through a number of iterations following circulation to Ministers and departments. The majority of this paper details the non-notified fast-track

consenting and designation process. I propose to report back to Cabinet on details of paths to further fast-track government-led projects.

7. Fast-track consenting processes have been enabled after previous emergencies, such as the Canterbury and Hurunui/Kaikōura earthquakes, to facilitate redevelopment and reinstate infrastructure<sup>1</sup>. Bespoke legislation<sup>2</sup> was also introduced to enable the timely completion of the National War Memorial Park before the 2015 centenary commemorations of the Gallipoli Campaign. I have considered these recent experiences in developing these proposals.
8. These proposals would be a short-term intervention to stimulate the economy, and therefore the new Act would self-repeal two years from enactment. Orders in Council developed under this legislation (prior to the self-repeal date) would continue to have effect, as required, or for the duration of a particular project.
9. I seek Cabinet agreement for the Minister for the Environment to:
  - a) have power to make further policy decisions not inconsistent with the proposals set out in this paper, in consultation with other appropriate Ministers
  - b) issue drafting instructions to the Parliamentary Counsel Office.
10. I will seek funding to implement the Act and operate the process through s 9(2)(f)(iv)

## Background

*The COVID-19 crisis is the worst economic and social shock in a generation*

11. The COVID-19 pandemic crisis is causing serious global economic and social disruption, the consequences of which will be felt for several years. This crisis is likely to be the most significant social and economic challenge New Zealand has faced in more than a generation. An economic recession is almost certain and unemployment will increase significantly. Action is needed now to support our recovery.

*Infrastructure and development projects can support economic recovery*

12. Economic recovery can be aided by bringing consenting and designation processes forward for many infrastructure and development projects. Projects varying in size and location, in urban centres and in the regions, are already planned for the short to medium-term by central and local government, as well as the private sector. Accelerating these projects provides a crucial opportunity to provide jobs and boost local economies. These projects need to be ready to support recovery once the threat of the COVID-19 pandemic recedes and restrictions are eased. A group led by Hon Phil Twyford and Hon Shane Jones are already compiling projects that may be considered for this process.

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<sup>1</sup> By the Canterbury Earthquake Recovery Act 2011 and Hurunui/Kaikōura Earthquakes Recovery Act 2016 respectively.

<sup>2</sup> The National War Memorial Park (Pukeahu) Empowering Act 2012.

13. Ministers have also received a request from non-governmental organisations (NGOs)<sup>3</sup> that the economic recovery should create jobs and transform the economy, while also addressing other challenges such as climate change, the decline in native species, poor freshwater quality, and the state of the marine environment. They see this as an opportunity for the Government to support projects that will help achieve better environmental outcomes, as a healthy population and economy is dependent on a healthy environment.
14. The Climate Change Commission has also encouraged the Government to apply a climate change lens to economic recovery measures<sup>4</sup>. The Climate Change Commission notes that an economic stimulus package can either speed up or stall progress towards climate goals. It recommends six principles for the Government to use in decision-making to help deliver an economic recovery:
- a) consider how stimulus investments can deliver long-term climate benefits
  - b) bring forward transformational climate change investments that need to happen anyway
  - c) prepare our workforce for the jobs of tomorrow
  - d) work in partnership with iwi/Māori, consistent with the principles of Te Tiriti o Waitangi
  - e) maintain incentives to reduce emissions and adapt to climate change
  - f) change how we measure the success of economic recovery, including use of the wellbeing indicators.
15. I want this legislation to provide investment certainty and help the economy to recover faster. However, this should be done in an environmentally responsible manner.
16. The fast-track process would be available to projects initiated by both government and private organisations. I consider it will be particularly appropriate for projects led by government agencies, local authorities and Crown entities, as they have a clear role in delivering public benefit, and are subject to a higher level of scrutiny than private organisations.
17. However, government-led projects should still be subject to a robust approval process, with assessment by persons with appropriate skills and experience. This will ensure that such projects meet the purpose of the new Act, and are carried out responsibly.

*Standard RMA consenting processes could affect the pace of recovery from COVID-19*

18. The RMA is the primary legislation that manages our built and natural environment. While standard resource consent processes under the RMA adequately enable development in normal circumstances, they will not provide the speed and certainty needed for significant projects during the COVID-19 recovery period.

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<sup>3</sup> Open Letter from Forest and Bird, EDS, WWF, Greenpeace, Generation Zero and Ecologic to the Prime Minister dated 8 April 2020, available at [https://mcusercontent.com/056bc28505444958c9358e331/files/909aa867-cb50-48a7-93c3-0b433650dcad/Letter\\_to\\_PM\\_from\\_ENGOs\\_Restoring\\_Aotearoa.pdf](https://mcusercontent.com/056bc28505444958c9358e331/files/909aa867-cb50-48a7-93c3-0b433650dcad/Letter_to_PM_from_ENGOs_Restoring_Aotearoa.pdf).

<sup>4</sup> Letter to Ministers, 7 April 2020.

19. Under standard RMA processes, councils sometimes have wide discretion on matters such as information requirements for applications and conditions of consent. Decisions on resource consents and notices of requirement for designations for large-scale projects are also often appealed to the courts. In these extraordinary times prescriptive consenting processes, or a risk of delay due to appeals, must not hinder the pace of recovery.

*Existing options to fast-track resource consenting are not sufficient*

20. In addition to standard consenting processes, the RMA has alternative approval processes for major projects, such as that for Proposals of National Significance, and direct referral of applications to the Environment Court or a Board of Inquiry.
21. These processes can be costly and time-consuming. This reduces the certainty needed to enable early investment in infrastructure and development projects.
22. A summary of existing approval pathways under the RMA is set out in Appendix 2, including information on the time periods and costs for each pathway. Essentially, I consider that no one existing consenting pathway, or combination of existing pathways, can adequately deal with our current need to provide certainty and speed for the delivery of projects that will assist our economic recovery.

*Other legislative programmes to accelerate urban development are not suitable for this*

23. There are some overlaps between the Government's Urban Development Bill (UDB) and the objectives of this proposal. However, this proposal will target infrastructure and development projects that can progress rapidly and support economic recovery from COVID-19, provided their resource consenting is expeditious. In contrast, the UDB is designed to facilitate complex urban development projects. It brings together a wider range of statutory processes than this proposal<sup>5</sup>, and would not be as fast.
24. The UDB is currently before the Environment Select Committee. I am aware that the Parliamentary Commissioner for the Environment submitted that the UDB's definition of 'urban development' is too broad, and in the Commissioner's view may authorise inappropriate departures from RMA processes. I do not consider this paper is the avenue to resolve these issues, which should be addressed by the Environment Select Committee as part of its consideration of the UDB.
25. At the same time, the UDB focuses on urban development, and not rural infrastructure and development projects. I therefore do not consider the UDB to be an appropriate vehicle to achieve the outcomes we want through this legislation.
26. The Government is reforming the resource management system in a two stage process, focusing on the RMA. Stage 1 comprises the Resource Management Amendment Bill 2019 currently before Parliament. Stage 2 is a comprehensive review by a Resource Management Review Panel, which is due to report back to me in mid-2020. The Stage

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<sup>5</sup> Statutory processes covered by the Urban Development Bill include targeted rates under the Local Government (Rating) Act 2002, bylaws under the Local Government Act 2002, reserve status under the Reserves Act 1971, and land acquisition under the Public Works Act 1981.

1 Bill will make interim improvements to the RMA, but does not provide for fast-track consenting. Stage 2 will not result in legislative proposals this Parliamentary term.

*Bespoke processes are necessary in times of crisis*

27. There is precedent for swift Government action to introduce bespoke processes to facilitate recovery following economic, social, and environmental shocks. Fast-track approval processes were most recently enabled following the Canterbury and Hurunui/Kaikōura earthquakes. While this global pandemic is not an earthquake event, the economic effects are similar, though far deeper and more widespread.
28. The emergency legislation for those earthquakes enabled Ministers to make Orders in Council, which authorised delegated legislation to amend, suspend, or override primary legislation. The use of such Orders in Council allowed recovery works to happen at pace. These processes are detailed in Appendix 3.
29. I have also considered the bespoke legislation that facilitated the completion of the National War Memorial (Pukeahu) in Wellington before the 2015 centenary commemorations for the Gallipoli Campaign. This legislation included a truncated resource consenting process and granted resource consents to the relevant agency. However, this project was highly defined and only covered a small area. It is not comparable to the current COVID-19 situation.

**Legislation to enable fast-track consenting**

30. I propose special legislation that will fast-track resource consenting and designations<sup>6</sup> and accelerate infrastructure and development projects, including local government projects (e.g. upgrading three waters infrastructure and community facilities and assets) and private developments.
31. This legislation will also help to deliver projects that will alleviate housing challenges, encourage active transport (i.e. walking and cycling), and enhance the environment or advance other green initiatives.
32. It will complement the Infrastructure Industry Reference Group's work to identify infrastructure projects that are 'shovel-ready' or will be within six months. The legislation will also support smaller projects that may generate fewer jobs in total, but collectively provide significant critical employment in hard-hit regions.
33. These proposals will also free up local authorities to deal more promptly with other planning and building consents within their systems. I have recently reiterated to council mayors, regional council chairs, and chief executives the crucial role their organisations will have to support recovery from COVID-19.

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<sup>6</sup> Applications to designate are called Notices of Requirement (NOR). Requiring authorities are Ministers of Crown, local authorities and approved network utility operator (i.e. Waka Kotahi New Zealand Transport Agency and Auckland International Airport Ltd). When an NOR is confirmed, this designates a site for a particular purpose in the district plan. This removes the need for developers to obtain district land use consents if their proposed work complies with the conditions of the designation. A NOR does not remove the need to apply for a regional resource consent.

34. As with the previous Acts which fast-tracked consents, I propose controls and safeguards to ensure that the powers are used appropriately and consistently with the legislation's purpose. This will be discussed further later in this paper.

*Purpose of the legislation*

35. I seek Cabinet agreement that the purpose of this legislation be to:
- a) urgently promote employment to support the recovery of New Zealand from the economic and social impacts of COVID-19
  - b) support certainty of ongoing investment across New Zealand
  - c) provide a fast-track resource consent process for a range of differently sized and located projects.
36. The legislation will do this while ensuring that the principles of the Treaty of Waitangi (Treaty) are taken into account, Treaty settlements are upheld, and the environment is not sacrificed.

*Projects that achieve multiple Government objectives should be prioritised*

37. This is also an opportunity to include projects that not only improve immediate economic and employment outcomes, but also support wider Government objectives of an efficient, sustainable and resilient future.
38. I intend that the legislation's fast-track processes apply to projects that are assessed as meeting the criteria listed in paragraph 52 below.

*There is already a list of projects which could benefit from this legislation*

39. I am working with Ministerial colleagues, the Infrastructure Industry Reference Group, local government, Treaty partners, and non-governmental organisations to identify suitable projects that will benefit from the fast-track process in this legislation. These could include, but are not limited to, projects identified in the following:
- a) the Infrastructure Commission database, which has several billion dollars of investment scheduled to begin within the next three years
  - b) Provincial Growth Fund approvals
  - c) regional economic development strategies and action plans
  - d) regional and district council growth strategies
  - e) council long term plans
  - f) regional land transport plans
  - g) proposals from iwi, industry groups and NGOs.
40. I will continue to consult with Ministerial colleagues to ensure this legislation is aligned with other COVID-19 response and recovery activities, and other Government priorities and work programmes.

*Sunset clause*

41. I propose that this legislation will self-repeal two years after enactment, as it will be a short term intervention to stimulate the economy and aid recovery. The sunset clause will ensure that the broad ranging powers will be in force no longer than is reasonably necessary.
42. However, some Orders in Council approved prior to the self-repeal date will continue to have effect depending on the projects and the length of time needed to complete them and to allow for the continuing effects of some activities.

**New processes to achieve the purpose of this legislation**

43. These proposals seek to fast-track RMA approvals timeframes so as support employment, while still achieving proper environmental outcomes. To do this three levels of intervention are proposed. The details of proposal three below are detailed in the bulk of this paper. I will report back to Cabinet to confirm policy details for proposals one and two below.

*One: Listing specific large-scale government-led projects in the legislation*

44. A list of specific large projects already in the National Land Transport Programme of Waka Kotahi/NZ Transport Agency's (NZTA) will be given their resource consents via the Bill in a similar way to the consenting of the State Highway 1 and rail rebuild following the Hurunui/Kaikōura earthquake. This list is not in this paper, but is expected to comprise up to six large projects, which will be described and approved by Cabinet in the LEG paper which follows. s 9(2)(f)(iv)

*Two: Enabling certain government-led projects to occur as of right, provided specified criteria are met*

45. Government agencies have requested the ability to undertake small-scale projects as of right. There are options for achieving this, such as providing a standing approval for smaller NZTA and KiwiRail maintenance or improvement activities. These could be limited to projects within existing road and rail corridors (including land acquired for such purposes, and bridged areas of land under corridors). There would be merit in also providing these powers to local authorities. I will report back to Cabinet on this matter.
46. I will also consider, in consultation with other appropriate Ministers, what dollar limit there should be to the value of any one project. Again, internal controls within local authorities, NZTA and KiwiRail will be relied upon to complete the projects in an environmentally sound way.

*Three: Providing a fast-track consenting process for other publicly or privately-led projects*

47. Any persons with eligible projects will be able to apply to the Minister for the Environment to use a fast-track consenting or designation process. I propose that the Minister be able to refer a project, via an Order in Council, to an Expert Consenting Panel (the Panel) if the Minister considers the project meets the purpose of the legislation. The framework of this process is detailed below.

## Framework for fast-track consenting process

48. For any project not eligible for processes one or two above, I propose a two-stage process:
- a) Orders in Council will confirm eligible projects
  - b) resource consents and designations needed for these projects will be considered and determined by a Panel.
49. The details and mechanisms of this process are outlined below and summarised in Appendix 1.

### *Taking into account the principles of the Treaty of Waitangi and upholding Treaty settlements*

50. When the Minister or other persons perform duties and functions under this legislation, they must take into account the principles of the Treaty of Waitangi.
51. Existing Treaty settlements must be upheld by this legislation. Broadly this will be done by:
- a) requiring decision-making processes in the legislation to reflect obligations set out in Treaty settlement legislation, including for any functions the legislation replaces
  - b) requiring decision-makers to have regard to any documents that settlements specify must be included in decision-making on resource consents
  - c) preventing development on land:
    - i. returned under a Treaty settlement unless there is agreement from the relevant iwi authority; or
    - ii. considered necessary for Treaty settlement purposes by the Minister for Treaty of Waitangi Negotiations.

### *Eligible projects and statutory criteria*

52. Any persons with eligible projects will be able to apply to the Minister for the Environment to use the fast-track process. I propose that the Minister be able to refer a project to a Panel if the Minister considers the project meets the purpose of the legislation. When making this determination, the Minister may take into account all or any of the following criteria:
- a) economic benefits for communities or industries affected by COVID-19
  - b) the social and cultural wellbeing of current and future generations -
  - c) whether the project would likely progress significantly faster by using this process

- d) whether the project will result in a significant public benefit. When considering whether it will do so, the Minister may have regard to any relevant matter, including whether the project will:
- i. generate employment
  - ii. increase housing supply and contribute to well-functioning urban environments
  - iii. provide infrastructure, to improve economic, employment, and environmental outcomes, and increase productivity
  - iv. improve environmental outcomes for coastal or freshwater quality, air quality, or indigenous biodiversity
  - v. minimise waste
  - vi. contribute to New Zealand's efforts to mitigate climate change, including accelerating New Zealand's transition to a low emissions economy
  - vii. promote the protection of historic heritage
  - viii. strengthen our environmental, economic and social resilience, including to natural hazards and the impacts of climate change.

53. As part of the eligibility assessment, the project must not:

- a) authorise any activity classified as prohibited in any plan or proposed plan;
- b) authorise any works in a customary marine title area under the Marine and Coastal Area (Takutai Moana) Act 2011, unless agreed in writing by the relevant customary marine title group;
- c) involve land returned under a Treaty settlement unless there is agreement from the relevant iwi authority; or
- d) involve land considered necessary for Treaty settlement purposes by the Minister for Treaty of Waitangi Negotiations.

54. An eligible project could be one large project or a group of smaller regional projects, and may cross local authority boundaries.

55. An applicant will need to provide adequate information to the Minister on how the project meets the relevant criteria and whether it would meet the purpose of the legislation. The Minister will have an ability to seek more information.

56. Where a large-scale project includes several steps to its planning or construction, it may be appropriate to expedite initial works ahead of all necessary information being provided to the Minister. In these instances, the Minister will have the ability to approve initial stages of a project, while retaining discretion on whether subsequent stages are also approved under the legislation, or follow an existing RMA consenting or designation process.
57. The Minister will have discretion to decline any application for a project, for any reason including but not limited to:
- a) it would be more appropriate for the project to go through the standard RMA consenting or designation process
  - b) directing the project to a Panel would not promote Part 2 of the RMA
  - c) the project is inconsistent with any relevant national direction under the RMA
  - d) directing the project to a Panel would be inconsistent with any Treaty settlement
  - e) the applicant has a poor history of environmental regulatory compliance
  - f) the applicant has not provided sufficient information to determine whether the project meets the eligibility criteria.

*Order in Council to confirm projects and use the fast-track consenting process*

58. Should the Minister for the Environment decide that a project meets the eligibility criteria, it will be confirmed as eligible through an Order in Council, and the consents for it would be considered by a Panel.
59. Before recommending the making of an Order in Council, the Minister will need to consider comments from key stakeholders and Treaty partners, and act consistently with relevant Treaty settlements. Key stakeholders could include (but would not be limited to) the relevant local authority, and appropriate Ministers to be specified in the legislation (such as the Ministers of/for Arts, Culture and Heritage, Infrastructure, Transport, Conservation, Land Information, Climate Change, Māori Crown Relations: Te Arawhiti, Local Government, and Treaty of Waitangi Negotiations.)
60. An Order in Council made under the Hurunui/Kaikōura Earthquake Recovery Act 2016 was able to modify any provisions of other legislation. I am not proposing such a wide-ranging power under this Bill, considering the different circumstances. Instead, I propose that relevant modifications to the RMA would be prescribed within the Bill itself.

*The Minister of Conservation is a joint decision maker to the extent that the project relates to the coastal marine area (CMA)*

61. Given the Minister of Conservation's role in the CMA under the RMA, I propose that for any project that is to be carried out in whole or partly in the CMA, the Order in Council must be prepared jointly with the Minister of Conservation.

*Proposed fast-track consenting and notice of requirement process*

62. Once an eligible project is confirmed through an Order in Council, I consider there should be a high level of certainty that a resource consent or designation will be granted. I propose that eligible projects follow a fast-track resource consent (or notice of requirement) process, and proceed as follows:
- a) the Minister will appoint an Expert Consenting Panel to consider and make decisions on applications for resource consents or designations
  - b) reduced information requirements will apply for applications for resource consents and designations
  - c) no requirement for public or limited notification of an application, but the Panel would be required to invite comments on the application from persons specified in the Order in Council, who at a minimum would be:
    - i. the relevant local authorities
    - ii. any relevant iwi authority
    - iii. any relevant customary marine title group, protected customary rights group or applicant group under the Marine and Coastal Area (Takutai Moana) Act 2011
    - iv. the owners and occupiers of any land on which the project is to be undertaken, or of any adjacent land
    - v. certain Ministers of the Crown (to be identified in the legislation)
    - vi. certain organisations or persons, to be identified in the legislation, including but not limited to environmental NGOs and infrastructure industry groups
    - vii. any other person that the Minister for the Environment (and Minister of Conservation, if the project relates to the coastal marine area) considers appropriate
  - d) reduced timeframes compared to standard RMA processes for the nominated persons to provide their comments
  - e) no requirement to hold a hearing
  - f) the Panel will be required to:
    - i. apply Part 2 of the RMA alongside the purpose of the new Act
    - ii. have regard to any relevant national direction, local authority plan or proposed plan, or other matter listed in section 104(1) of the RMA when considering applications for resource consents

- iii. have particular regard to the matters similarly listed in section 171(1) and (1B) of the RMA when considering applications for designations
- g) the Panel must have regard to any documents that Treaty settlements specify must be included in decision making on resource consents or designations the Panel cannot commit a local authority to capital expenditure
- h) the Panel must issue its decision on the application it is considering within 25 working days of the date it specifies it must receive comments on the application
- i) the Panel can double this 25 working day timeframe if the scale of the project that is the subject of the application means it cannot be determined within that timeframe
- j) the Panel may only decline the resource consents or designations in certain circumstances to be set out in the legislation, such as:
  - i. the Panel considers the information provided to it is insufficient or inadequate
  - ii. the consent cannot be granted in a manner that promotes Part 2 of the RMA
  - iii. granting consent would be contrary to the objectives or policies relating to freshwater quantity or freshwater quality in any operative or proposed plan, or freshwater national direction, or any Water Conservation Order
  - iv. granting consent would be inconsistent with any relevant Treaty settlement legislation
  - v. the activity is likely to cause any adverse effect that is more than minor on the exercise of a protected customary right
- k) for projects including multiple activities, of any size, the Panel may issue decisions in stages to enable initial works to be started while further details and/or later stages of the project are worked through in subsequent approval processes.

*The Panel will make decisions for designations*

63. For clarity, I propose that a Panel will make 'decisions' for notices of requirement (NORs) to confirm designations lodged by requiring authorities. Under standard RMA processes, requiring authorities<sup>7</sup> are the decision makers and the relevant local authority<sup>8</sup> only make recommendations.

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<sup>7</sup> Crown Ministers, local authorities or network utility operators approved by the Minister for the Environment as requiring authority.

<sup>8</sup> If the NOR was lodged with the local authority (and not BOI or direct referral to the Environment Court).

64. I consider it is not appropriate for the requiring authority to make the decision on a designation and conditions when the fast-track process is being used, given the lack of a merits appeal. Therefore, I propose that the Panel makes the decision on a designation<sup>9</sup>. This is in line with the decision-making framework for Boards of Inquiry considering proposals of national significance.

#### *Appeal rights*

65. I propose that appeals against a Panel decision on a resource consent (or NOR to confirm a designation) will be limited to a point of law appeal to the High Court and a further right of appeal to the Court of Appeal, with no right of appeal to the Supreme Court. Any application for judicial review would need to be filed at the same time as a point of law appeal.
66. I propose that the following persons will be able to lodge an appeal:
- a) a local authority
  - b) the applicant, in relation to a resource consent
  - c) the requiring authority, in relation to a notice of requirement for a designation
  - d) the Attorney-General representing a relevant aspect of the public interest
  - e) a person who has an interest in the decision that is greater than the interest that the general public has, which would generally include the relevant iwi authority and adjacent landowners.

#### *Appointment and functions of Panels*

67. Expert Consenting Panels will be appointed to consider and determine applications for resource consents and/or NORs for eligible projects specified in Orders in Council. A related group of projects may be included under a single Order in Council; or a Panel may consider a number of Orders in Council. Panels will be appointed by the Minister for the Environment (and jointly with the Minister of Conservation if the project relates to the CMA.)
68. The Panel will be provided with functions, duties and powers similar to those provided to consent authorities in the RMA when making decisions on resource consents and designations.
69. The Minister for the Environment will set the terms of reference, when the appointment commences/ceases, and have the ability to remove members from the Panel at any time for just cause and appoint new members to the relevant Panel.

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<sup>9</sup> Under the RMA, only activities requiring resource consents can be “controlled activities” and this mechanism does not apply to designations. The Bill would be designed to achieve a similar position for designations, in that the consent authority would be required to confirm the notice of requirement for a designation and the consent authority’s ability to impose conditions would be limited to certain matters of control.

70. A Panel will generally have no more than four members. However, the Panel could exceed five in order to accommodate circumstances unique to a region or locality or a number of projects.
71. Where a Treaty settlement applies to decision making for consent approval for a project, the composition of the Panel will need to comply with any requirement relating to hearing commissioners, or in relation to the resource consents concerned.
72. Unless otherwise provided for in the Treaty settlement, the Panel will be chaired by a current or retired Environment Court Judge (or other judge, or senior lawyer with resource management expertise), include a member of (or person nominated by) the relevant local authority(ies), and include a representative nominated by the relevant iwi authority(ies). Collectively the Panel must have:
- a) knowledge, skill and experience relating to resource management
  - b) technical expertise in relation to the project or the effects of the project
  - c) expertise in tikanga Māori and mātauranga Māori.
73. I propose that the Panel will be able to determine its own procedure in such a manner it thinks appropriate, including commissioning of reports, and the ability to appoint a technical advisor.

*Secretariat support, and cost recovery*

74. I propose that, if requested, the Environmental Protection Agency (EPA) must provide advice or secretariat support to the Minister for the Environment in developing an Order in Council, or a Panel in determining an application.
75. I also propose that, if requested, the relevant local authority be required to assist the Panel by providing advice. I propose the local authority could also be required to review applications and assist applicants, where needed.
76. Costs incurred in the Panel process will be met by the relevant applicant/s. Such costs could include assessing the application, inviting feedback, commissioning reports, and making the decision/s. This applies to the costs incurred by the EPA or local authority, should their services be needed by the Panel.

**Further options being considered: processes specific to certain government-led projects**

77. This paper has been through a number of iterations following feedback from Ministers and departments. In principle it seeks to fast-track RMA approvals timeframes so as to support employment, while still achieving proper environmental outcomes. It does this by curtailing normal rights of public participation, but still applying Part 2 of the RMA.
78. In addition to listing specific government-led projects in the legislation, it has been suggested that certain government agencies (such as NZTA or KiwiRail) and local authorities should be enabled to carry out projects within existing road and rail corridors (including land acquired for such purposes, and bridged areas of land under corridors) as of right. Thresholds for this approach, including maximum dollar value, for these

projects are being considered. Consideration is also being given as to whether this would be by a form of self-consenting, or by deeming activities to be permitted.

79. These options carry some risk of a less robust assessment of environmental effects. However, as stated earlier in this paper, central and local government agencies have a clear role in delivering public benefit, are subject to a higher level of scrutiny than private organisations, and have governing legislation that requires environmental considerations. The Minister and/or the Panel can be justified in having greater faith in them, as democratically accountable organisations, to appropriately manage environmental outcomes.
80. I therefore agree there is merit in further considering options for the Minister or the Panel to expedite smaller scale government-led projects. These could include:
- a) roading or active transport projects
  - b) drinking water, stormwater, and sewage treatment projects
  - c) freshwater improvement projects, such as
    - i. the removal of sediment build-up in rivers, lakes and estuaries
    - ii. reinstatement of wetlands
    - iii. riparian (or more general) planting in catchments to reduce future sediment
  - d) track and hut maintenance or establishment on public lands
  - e) weed control on public or private lands.
81. A safeguard on such powers being exercised could include that activities involved are not prohibited or non-complying under the relevant regional or district plan.
82. I will report back to Cabinet on these proposals with the Minister for Infrastructure, on what thresholds should apply, up to which permitted activity could occur.

### **Outstanding matters**

#### *Engagement with Māori*

83. I have received feedback from the Minister for Māori Crown Relations: Te Arawhiti, and the Minister of Māori Development. This feedback requested that an avenue and time be provided for iwi policy technicians to participate in the development of this new legislation alongside officials. Accordingly, I seek Cabinet agreement to do so.
84. I also propose that this Cabinet paper be shared with the Iwi Chairs Forum Pandemic Response Group.

#### *The need to align Government funding and programmes*

85. I consider this legislation will provide significant support to our economy as it recovers from the impact of COVID-19. However, the full benefits of the legislation will only be

maximised if the Government aligns other relevant work streams – the Provincial Growth Fund, Infrastructure Commission Pipeline, and funding for local government.

86. As the Government develops a broader picture of the pipeline of projects that may be eligible for the fast-track consenting and designation process, I will consult with Ministers to ensure there will be sufficient training and other support for workers moving into project roles, as well as a clear understanding of the overall benefits accruing from this pipeline approach. I propose to report back to Cabinet at regular intervals to provide progress updates.

*Outstanding additional policy decisions required*

87. Given the speed at which the proposals in this paper have been developed, a number of policy issues remain outstanding. I seek Cabinet agreement to make further policy decisions, including:

- a) the projects that will be listed directly in the legislation and the processes that will apply to them
- b) the details of how government-led projects will be expedited, including threshold or land tenure considerations, as discussed in paragraphs 77 to 82 above
- c) the development of the Order in Council process (such as, information requirements for an application, criteria relevant to an application, a list of key stakeholders to consult with, and ability for the Minister for the Environment to direct a project to proceed via an existing consenting process under the RMA), and aspects of the Panel's consenting process, such as:
  - i. the Panel's membership
  - ii. the Panel's role, duties, functions, timeframes, and procedures
  - iii. information requirements for applications
  - iv. how the Panel may process consents in stages
  - v. the scope of conditions of consent
  - vi. the circumstances where the Panel may decline consent
- d) any other policy decisions not inconsistent with the proposals in this paper.

88. Prior to reporting back to Cabinet I will consult with other appropriate Ministers including, but not limited to the Ministers of/for Infrastructure, Transport, Conservation, Land Information, Climate Change, Māori Crown Relations: Te Arawhiti, Local Government, and Treaty of Waitangi Negotiations.

*Procedural matters*

89. I seek Cabinet agreement to issue drafting instructions to the Parliamentary Counsel Office to draft the special legislation and consequential amendments required to the RMA and other affected statutes.

## Consultation

90. The Ministry for the Environment (MfE) has consulted with Te Arawhiti, Department of Conservation, Department of Corrections, Department of Internal Affairs, Environmental Protection Authority, Heritage New Zealand Pouhere Taonga, KiwiRail Holdings Limited (KiwiRail), Infrastructure Commission, Land Information New Zealand, Ministry for Business, Innovation and Employment, Ministry of Culture and Heritage, Ministry of Health, Ministry of Housing and Urban Development, Ministry for Primary Industries, Ministry of Transport, Ministry of Justice, New Zealand Transport Agency, Te Puni Kōkiri, Kāinga Ora and Treasury. The Department of the Prime Minister and Cabinet was kept informed. The proposals have also been discussed with the Legislation Design and Advisory Committee.
91. I have also consulted directly with the Parliamentary Commissioner for the Environment.
92. Key considerations agencies identified are noted in the table below. My officials have considered these concerns, and the majority of feedback has been incorporated into this paper.

Category	Issues raised
Intent	<p>The proposals should:</p> <ul style="list-style-type: none"> <li>• address wider economic benefits as well as employment</li> <li>• provide for both state and private sector projects</li> <li>• be consistent with: <ul style="list-style-type: none"> <li>○ the intent of Part 2 of the RMA</li> <li>○ existing national direction and the draft National Policy Statements for Urban Development and on Highly Productive Land</li> <li>○ maintaining or improving environmental outcomes</li> </ul> </li> <li>• be strictly time limited to avoid land-banking type behaviour</li> <li>• demonstrate that faster development will actually be delivered.</li> </ul> <p>Projects should:</p> <ul style="list-style-type: none"> <li>○ have long-term enduring benefits</li> <li>○ be limited to specific types of activities that support transition to an economy that meets our climate commitments and freshwater aspirations</li> <li>○ be identified under urban growth partnerships/spatial planning processes</li> <li>○ have nationally or locally significant impacts</li> <li>○ be ready to progress within the COVID-19 recovery timeframes</li> <li>○ contribute towards ecosystem restoration</li> <li>○ have firm funding in place.</li> </ul>
Iwi/Māori	<ul style="list-style-type: none"> <li>• The Treaty and Treaty settlements need to be integrated.</li> <li>• Aspirations of Māori need to be provided for in project eligibility.</li> <li>• Engagement with Iwi/Māori must be integral to the process.</li> <li>• Iwi should have a role in development of the proposal decision making.</li> </ul>
Coverage	<p>The proposals should/should not:</p> <ul style="list-style-type: none"> <li>• cover approvals under other regulatory regimes; e.g. Heritage New Zealand Pouhere Taonga Act, Wildlife Act, Marine Mammals Act, Conservation Act and Reserves Act</li> <li>• include decisions on water takes, discharges, coastal marine area, aquaculture</li> <li>• override the Public Works Act 1981.</li> </ul>
Process	<p>Whether it is possible to achieve the intent of the proposals by speeding up existing processes without reducing engagement or appeal rights.</p>

	<p>Need to be clear on:</p> <ul style="list-style-type: none"> <li>• what is being traded off for increased speed</li> <li>• information requirements for applicants</li> </ul> <p>The proposals should/should not specify conditions in legislation or Orders in Council.</p> <p>Must include:</p> <ul style="list-style-type: none"> <li>• the role of the Minister of Conservation as the relevant Minister for coastal marine activities under the RMA</li> <li>• clear roles for, and engagement with, local government</li> <li>• the role of Kāinga Ora.</li> </ul>
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### Financial implications

93. The cost of developing the special legislation and any costs in FY2019/20 will be absorbed within existing departmental baselines. The cost of implementing the legislation when enacted will require additional funding. This will cover the following:
- a) MfE or the EPA (if its assistance is requested by the Minister) to review eligibility of applications and development of Orders in Council
  - b) coordination and secretariat support for the Panel (if needed)
  - c) costs of the Panel (if needed).

s 9(2)(f)(iv)

96. s 9(2)(f)(iv)

### **Legislative implications**

97. The policy decisions from this paper will require legislative change to be progressed through a Bill and the resulting legislation will be binding on the Crown. This Bill is not currently included in the Government's legislative programme s 9(2)(f)(iv)

### **Regulatory impact analysis**

98. The Treasury has determined that this proposal is a direct COVID-19 response and has suspended the RIA requirements in accordance with a Cabinet decision (CAB-20-MIN-0138 refers). The proposal represents a significant change from the status quo and the Treasury has worked intensively with MfE to ensure all available relevant analysis is included in this paper. The monitoring and evaluation measures covered in this proposal should be strictly adhered to in order to prevent unintended consequences that could not have been assessed systematically due to time constraints.

99. The Climate Portfolio division within MfE has been consulted and confirms that the climate implications of policy' assessment (CIPA) requirements do not apply to this proposal. The emissions impacts are unable to be accurately determined in quantitative terms due to the uncertainty around what infrastructure projects this will affect. The extent of any emissions increase or reduction will be determined by each project granted consent through processes established by this proposed legislation.

### *Evaluation Criteria*

100. The criteria used to evaluate the preferred option of special legislation were:

- a) Effectiveness: the extent to which the option will achieve the objectives
- b) Equity: what equity issues might it create
- c) Flexibility: how flexible is the proposed option
- d) Risk: the potential for unintended consequences.

101. Developing bespoke legislation is an effective option compared to the status quo as it will directly enable physical works to be commenced earlier for projects that might otherwise have a slow and uncertain pathway through existing RMA consenting processes.

102. Whilst maintaining checks and balances, being a fast-track process means the preferred option of special legislation could mean that not all parties have equal access to the fast-track consenting and designation process. For example, it might favour 'shovel-ready' large proposals, where other smaller or non-infrastructure related projects may exist that would also benefit the economy. However, the proposal involves processes and eligibility criteria that will ensure clarity for all parties about how to access the most appropriate consenting process.


103. The proposal has been designed to enable flexibility in the way in which projects of different scales can be consented.
104. The risks identified with the proposal include disruption of the existing resource consenting and designation system, the risk of judicial review of decisions, and the prospect of new jurisprudence. These are mitigated by targeting proposals of regional or national significance to use the fast-track consenting and designation process, the development of strong eligibility criteria and the insertion of independent review through the use of panels.

*Caveats, limitations and uncertainties of the analysis*

105. Given the speed at which this proposal has had to be developed, a full analysis of all alternative options has not been possible. However, the preferred option has the benefit of being based on previous examples of legislation designed to respond to emergency events.

**Other relevant legislation**

s 9(2)(f)(iv)





**Human rights, gender implications and disability perspective**

121. There are no human rights, gender and disability implications associated with this paper.

**Publicity**

122. s 9(2)(f)(iv)

**Proactive Release**

123. The paper will be proactively released as soon as practicable following the introduction of the Bill.

## Recommendations

The Minister for the Environment (the Minister) recommends that Cabinet

1. note that the COVID-19 pandemic crisis is causing serious economic and social effects, the consequences of which will be felt for several years
2. note that standard consenting and designation processes under the Resource Management Act 1991 (RMA) could constrain the pace of recovery and projects needed to employ people

### Legislation to enable fast-track consenting

3. agree that special legislation (the legislation) be enacted with the purpose of assisting the economic recovery from the effects of COVID-19 by fast-tracking consenting and designations for specified development and infrastructure projects
4. note that the design of the proposed legislation has drawn on experiences from special legislation passed following the Canterbury and Hürunui/Kaikoura earthquakes
5. note that this is an opportunity to support economic activity through infrastructure and development projects that can commence rapidly, as well as addressing a range of environmental challenges
6. note that this proposal will complement the Infrastructure Industry Reference Group's work to identify infrastructure projects that are 'shovel-ready', or will be within six months
7. note that the proposal will also support smaller projects that could collectively provide critical employment

### *Purpose of the legislation*

8. agree that the purpose of the special legislation be to:
  - a. urgently promote employment to support the recovery of New Zealand from the economic and social impacts of COVID-19
  - b. support certainty of ongoing investment across New Zealand
  - c. provide a fast-track resource consent process for a range of differently sized and located projects
9. agree that the legislation, to be called the COVID-19 Recovery (Fast-Track Consenting) Bill 2020 will provide a fast-track consenting and designation process in order to meet the above purpose, while ensuring that the principles of the Treaty of Waitangi (Treaty) are taken into account, Treaty settlements are upheld, and the environment is not sacrificed

*Projects that achieve multiple Government objectives should be prioritised*

10. note that it is the Minister for the Environment's intention that the legislation's fast-track process apply to projects that are assessed as meeting the criteria listed in recommendation 22 below
11. note that the Minister for the Environment is working with Ministerial colleagues, the Infrastructure Industry Reference Group, local government, Treaty partners, and non-governmental organisations (NGOs) to identify suitable projects that will benefit from the fast-track process in this legislation

*Sunset clause*

12. agree that the legislation will self-repeal two years after enactment, but with some Orders in Council approved prior to the self-repeal date continuing to have effect, depending on the projects and the length of time needed to complete them and to allow for the continuing effects of some activities

**New processes to achieve the purpose of this legislation**

13. note that the proposals in this paper have been through a number of iterations following feedback from Ministers and departments
14. agree that there be three levels of intervention to achieve the purpose of this legislation:
  - a. list specific large-scale government-led projects in the Bill
  - b. enable certain central and local government-led projects to occur as of right, provided specified criteria are met
  - c. provide a fast-track resource consenting and designation process for other publicly or privately led projects
15. note that processes and details relating to the listing of projects in the legislation, and enabling certain government-led projects to occur as of right, continue to be refined

**Framework for fast-track consenting process**

16. agree that projects not listed in the legislation, or government-led projects that will be enabled to occur as of right, will be eligible for consideration by the Minister to use a fast-track consenting and designation process
17. agree that the fast-track consenting and designation process will have two stages:
  - a. eligible projects to be confirmed through Order in Council
  - b. resource consents and designations needed for these projects will be considered and determined by an Expert Consenting Panel (Panel)
18. agree that the new process will enable the Minister for the Environment to recommend that the Governor-General make Orders in Council that specify projects eligible to be considered by a Panel

*Taking into account the principles of the Treaty of Waitangi and upholding Treaty settlements*

19. agree that when the Minister or other persons perform duties and functions under this legislation, they must take into account the principles of the Treaty of Waitangi
20. agree that existing Treaty settlements must be upheld by this legislation, and that broadly this will be done by:
  - a. requiring decision-making processes in the legislation to reflect obligations set out in Treaty settlements, including for functions the legislation replace
  - b. requiring decision-makers to have regard to any documents that settlements specify must be included in decision-making on resource consents
  - c. preventing development on land:
    - i. returned under a Treaty settlement unless there is agreement from the relevant iwi authority; or
    - ii. considered necessary for Treaty settlement purposes by the Minister for Treaty of Waitangi Negotiations

*Eligible projects and statutory criteria*

21. agree that any persons with eligible projects will be able to apply to the Minister for the Environment to use the fast-track process, with the Minister being able to refer a project to a Panel if the Minister considers the project meets the purpose of the legislation
22. agree that when making the eligibility assessment, the Minister may take into account all or any of the following criteria:
  - a. economic benefits for communities or industries affected by COVID-19
  - a. the social and cultural wellbeing of current and future generations
  - b. whether the project would likely progress significantly faster by using this process
  - c. whether the project will result in a significant public benefit, in respect of which, the Minister may have regard to any relevant matter, including whether the project will:
    - i. generate employment
    - ii. increase housing supply and contribute to well-functioning urban environments
    - iii. provide infrastructure, to improve economic, employment, and environmental outcomes, and increase productivity
    - iv. improve environmental outcomes for coastal or freshwater quality, air quality, or indigenous biodiversity

- v. minimise waste
  - vi. contribute to New Zealand's efforts to mitigate climate change, including by accelerating New Zealand's transition to a low-emissions economy
  - vii. promote the protection of historic heritage
  - viii. strengthen our environmental, economic and social resilience, including to natural hazards and the impact of climate change
23. agree that, as part of the eligibility assessment, the project must not:
- a. authorise any activity classified as prohibited in any plan or proposed plan
  - b. authorise any works in a customary marine title area under the Marine and Coastal Area (Takutai Moana) Act 2011, unless agreed in writing by the relevant customary marine title group
  - c. involve land returned under a Treaty settlement, unless there is agreement from the relevant iwi authority; or
  - d. involve land considered necessary for Treaty settlement purposes by the Minister for Treaty of Waitangi Negotiations
24. agree that an eligible project could be one large project, or a group of smaller regional projects, and may cross local authority boundaries
25. agree that an applicant will need to provide adequate information to the Minister on how the project meets the relevant criteria and whether it would meet the purpose of the legislation, and the Minister will have the ability to request further information from the applicant
26. agree that the Minister will have the ability to approve initial stages of a project, while retaining discretion on whether subsequent stages are considered under the legislation, or follow an existing RMA consenting or designation process
27. agree that the Minister will have discretion to decline any application for a project for any reason including but not limited to:
- a. it would be more appropriate for the project to go through the standard RMA consenting or designation process
  - b. directing the project to the Panel would not promote Part 2 of the RMA
  - c. the project is inconsistent with any relevant national direction under the RMA
  - d. directing the project to the Panel would be inconsistent with any Treaty settlement
  - e. the applicant has a poor history of environmental regulatory compliance
  - f. the applicant has not provided sufficient information to determine whether the project meets the eligibility criteria

*Order in Council to confirm projects and use the fast-track consenting process*

28. agree that these projects will be confirmed as eligible through an Order in Council, and the applications for resource consents and notices of requirement for the eligible project will be considered by a Panel
29. agree that before recommending the making of an Order in Council, the Minister will need to consider comments from key stakeholders and Treaty partners, and act consistently with relevant Treaty Settlements
30. agree that key stakeholders could include (but not be limited to) the relevant local authority, and appropriate Ministers to be specified in the legislation (such as the Ministers of/for Arts, Culture, and Heritage, Infrastructure, Transport, Conservation, Climate Change, Māori Crown Relations: Te Arawhiti, Local Government, and Treaty of Waitangi Negotiations)
31. note that once an Order in Council is made, there should be a high level of certainty a resource consent will be granted

*The Minister of Conservation is a joint decision-maker to the extent that the project relates to the coastal marine area*

32. agree that for any project that is to be carried out in whole or partly in the Coastal Marine Area, the Order in Council must be prepared jointly with the Minister for Conservation

*Proposed fast-track resource consent and notice of requirement process*

33. agree that an eligible project (confirmed through an Order in Council) will follow a fast-track resource consent (or notice of requirement) process, and would proceed as follows:
  - a. the Minister for the Environment would appoint a Panel to consider and make decisions on applications for resource consents or designations
  - b. reduced information requirements would apply for the applications for resource consents and designations
  - c. no requirement for public or limited notification of an application, but the Panel would be required to invite comments on the application from persons specified in the Order in Council, who at a minimum would be:
    - i. the relevant local authorities
    - ii. any relevant iwi authority
    - iii. any relevant customary marine title group, protected customary rights group or applicant group under the Marine and Coastal Area (Takutai Moana) Act 2011
    - iv. the owners and occupiers of any land on which the project is to be undertaken, or of any adjacent land

- v. certain Ministers of the Crown (to be identified in the legislation)
  - vi. certain organisations or persons, to be identified in the legislation, being but not limited to environmental NGOs and infrastructure industry groups
  - vii. any other person that the Minister for the Environment (and Minister of Conservation, if the project relates to the coastal marine area) considers appropriate
34. agree that there will be reduced timeframes compared to standard RMA processes for the nominated persons to provide their comments
35. agree that there will be no requirement to hold a hearing
36. agree that the Panel will be required to:
- a. apply Part 2 of the RMA alongside the purpose of the new Act
  - b. have regard to any relevant national direction, local authority plan or proposed plan, or other the matter listed in section 104(1) of the RMA when considering applications for resource consents
  - c. have particular regard to the matters similarly listed in section 171(1) and (1B) of the RMA when considering applications for designations
37. agree that the Panel must consider any documents that any relevant Treaty settlement specifies must be included in decision-making on resource consents or designations
38. agree that the Panel cannot commit a local authority to capital expenditure
39. agree that the Panel must issue its decision on the application it is considering within 25 working days of the date it specifies it must receive comments on the application
40. agree that the Panel can double this 25 working day timeframe if the scale of the project that is the subject of the application means it cannot be determined within that timeframe
41. agree that for projects including multiple activities, of any size, the Panel may issue decisions in stages to enable initial works to be started while further details and/or later stages of the project are worked through in subsequent approval processes
42. agree that the Panel may only decline the resource consents or designations in certain circumstances to be set out in the legislation, such as:
- a. if the Panel considers the information provided to it is insufficient or inadequate
  - b. the consent cannot be granted in a manner that promotes Part 2 of the RMA
  - c. granting consent would be inconsistent with any objectives or policies in relevant national direction

- d. granting consent would be contrary to the objectives or policies relating to freshwater quantity or freshwater quality in any operative or proposed plan, or national direction, or any Water Conservation Order
- e. granting consent would be inconsistent with any relevant Treaty settlement legislation
- f. if the activity is likely to cause any adverse effect that is more than minor on the exercise of a protected customary right

*The Panel will make decisions for designations*

- 43. agree that to expedite the process the Panel will be the decision-maker for designations in the same manner as a Board of Inquiry when considering notices of requirement as part of nationally significant proposals

*Appeal rights*

- 44. agree that appeals against a decision of the Panel on the resource consent (or notice of requirement to confirm a designation) will be limited to a point of law appeal to the High Court with a further right of appeal to the Court of Appeal, with no right to appeal to the Supreme Court
- 45. agree that any application for judicial review would need to be filed at the same time as a point of law appeal
- 46. agree that the following persons will be able to lodge an appeal:
  - a. a local authority
  - b. the applicant, in relation to a resource consent
  - c. the requiring authority, in relation to a notice of requirement for a designation
  - d. the Attorney-General representing a relevant aspect of the public interest
  - e. a person who has an interest in the decision that is greater than the interest that the general public has, which would generally include the relevant iwi authority and adjacent landowners

*Appointment and functions of the Panel*

- 47. agree that the Minister for the Environment will be able to appoint Panels to consider and determine applications for resource consents and/or notices of requirement for eligible projects specified in Orders in Council
- 48. agree that the Panel will be appointed jointly with the Minister of Conservation if the project relates to the Coastal Marine Area
- 49. agree that the Panel will be provided with functions, duties and powers similar to those provided to consent authorities in the RMA when making decisions on resource consents and designations

50. agree that the Minister for the Environment will set the terms of reference, specify when the appointment commences/ceases, and have the ability to remove members from a Panel at any time for just cause and appoint new members
51. agree that a Panel will generally have no more than four members, but could exceed four in order to accommodate circumstances unique to a region or locality, or number of applications considered
52. agree that where a Treaty settlement applies to decision-making for consent approval for a project, the composition of the Panel will need to comply with any requirement relating to hearing commissioners, or in relation to the resource consents concerned
53. agree that, unless otherwise provided for in the Treaty settlement, the Panel will be chaired by a current or retired Environment Court Judge (or other judge, or senior lawyer with resource management expertise), and include a member of (or person nominated by) the relevant local authority(ies), and include a representative nominated by the relevant iwi authority(ies)
54. agree the Panel must collectively have:
  - a. knowledge, skill, and expertise relating to resource management
  - b. technical expertise in relation to the project or the effects of the project
  - c. expertise in tikanga Māori and mātauranga Māori
55. agree that the Panel will be able to determine its own procedure as it thinks appropriate, including the commissioning of reports, and the ability to appoint technical advisors

*Secretariat support, and cost recovery*

56. agree that, if requested, the Environmental Protection Agency (EPA) must provide advice or secretariat support to the Minister for the Environment in developing an Order in Council, or a Panel determining an application
57. agree that, if requested, the relevant local authority be required to assist the Panel by providing advice, and also be required to review applications and assist applicants, where needed
58. agree that costs incurred by the EPA or local authority in supporting the Panel process will be cost recoverable from the relevant applicant/s

**Further options being considered: processes specific to certain government-led projects**

59. note that in addition to listing specific projects in the legislation, it has been suggested that certain government agencies (such as Waka Kotahi/NZTA, Kāinga Ora - Homes and Communities (Kāinga Ora), the Ministry for Housing and Urban Development (MHUD), or KiwiRail), and local government, should be enabled to carry out projects as of right within existing road corridors, rail corridors, or on land owned by Kāinga Ora or MHUD

60. note that thresholds for this approach, including a maximum dollar value, are being considered
61. note that consideration is also being given as to whether this approach would be by a form of self-consenting, or by deeming activities to be permitted
62. note that these options carry some risk of a less robust assessment of environmental effects
63. note, however, that central and local government agencies have a clear role in delivering public benefit, are subject to a higher level of scrutiny than private organisations, and have governing legislation that requires environmental considerations
64. note the Minister for the Environment and Minister for Local Government will report back to Cabinet via the following LEG paper on any further changes to enable local authorities to advance their three waters, roading, or housing projects
65. note that the Minister for the Environment and/or a Panel can be justified in having greater faith in government agencies, as democratically accountable organisations, to appropriately manage environmental outcomes
66. agree that there is merit in further considering options to expedite government agency led projects
67. invite the Minister for the Environment and Minister for Infrastructure to report back to Cabinet on what thresholds should apply, up to which permitted activity could occur
68. note that a safeguard on such powers being exercised could include that activities involved are not classified as prohibited or non-complying activities under the relevant regional or district plan

### **Outstanding matters**

#### *Engagement with Māori*

69. note that fast-track processes risk impacting existing Treaty settlements and the relationship between Māori and the Crown
70. agree that an avenue and time be provided for iwi policy technicians to participate in the development of this new legislation alongside officials
71. agree that this Cabinet paper be shared with the Iwi Chairs Forum Pandemic Response Group

#### *The need to align Government funding and programmes*

72. note that the Minister for the Environment will consult with other Ministerial colleagues to ensure the Government provides sufficient training and other support for workers moving into project roles, as well as a clear understanding of the overall benefits accruing from this pipeline approach

73. note that I propose to report back to Cabinet at regular intervals to provide progress updates

*Outstanding additional policy decisions required*

74. note that a number of policy issues remain outstanding
75. agree to delegate to the Minister for the Environment the ability to make further policy decisions, in consultation with other appropriate Ministers (including but not limited to the Minister for Māori Crown Relations: Te Arawhiti, Minister for Housing Minister of Conservation, Minister of Land Information, Minister for Climate Change, Minister of Local Government, and Minister for Treaty of Waitangi Negotiations)
76. agree these matters will include:
- a. the projects that will be listed directly in the legislation and the processes that will apply to them
  - b. the details of how government-led projects will be expedited, including threshold or land tenure considerations, as discussed in recommendations 59 to 68 above
  - c. the development of the Order in Council process (such as information requirements for an application, criteria relevant to an application, a list of key stakeholders to consult with, and ability for the Minister for the Environment to direct a project to proceed via an existing consenting or designation process under the RMA), and aspects of the Panel's consenting and designation process, such as:
    - i. the Panel's membership
    - ii. the Panel's role, duties, functions, timeframes, and procedures
    - iii. information requirements for applications
    - iv. how the Panel may process consents in stages
    - v. the scope of conditions of consent
    - vi. the circumstances where the Panel may decline consent
  - d. any other policy decisions not inconsistent with the proposals in this paper
77. invite the Minister for the Environment to report back to Cabinet on these outstanding matters

**Financial implications**

78. note that the costs of developing this special legislation and any costs incurred in FY2019/20 will be met within existing departmental baselines
79. agree that funding for implementing and operating the legislation will be considered through the <sup>s 9(2)(f)(iv)</sup> [REDACTED]

80. s 9(2)(f)(iv)

### **Procedural matters**

81. note that the Treasury has determined that this proposal is a direct COVID-19 response and has suspended the RIA requirements in accordance with Cabinet decision (CAB-20-MIN-0138)
82. note that the Treasury considers that the proposal represents a significant change from the status quo and has worked intensively with the Ministry for the Environment to ensure all available relevant analysis is included in this paper. The monitoring and evaluation measures covered in this proposal should be strictly adhered to in order to prevent unintended consequences that could not have been assessed systematically due to time constraints
83. authorise the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office to draft the legislation
84. agree that this Bill will be added to the Legislation Programme with a priority 2 category and will need to be passed as soon as practicable, but that the drafting of immediate, special legislation to respond to the various issues arising from the COVID-19 lockdown is to take precedence over this Bill
85. authorise the Minister for the Environment to develop any commencement, transitional and savings provisions with the Parliamentary Counsel Office through the drafting process
86. note that the drafted commencement and transitional provisions will be subject to approval by Cabinet when it considers the Bill for introduction
87. note that this Cabinet paper will be proactively released as soon as practicable following introduction of the Bill
88. note that the Minister for the Environment will report back to Cabinet at regular intervals to provide progress updates

### **Other relevant legislation**

s 9(2)(f)(iv)

s 9(2)(f)(iv)

Authorised for lodgement

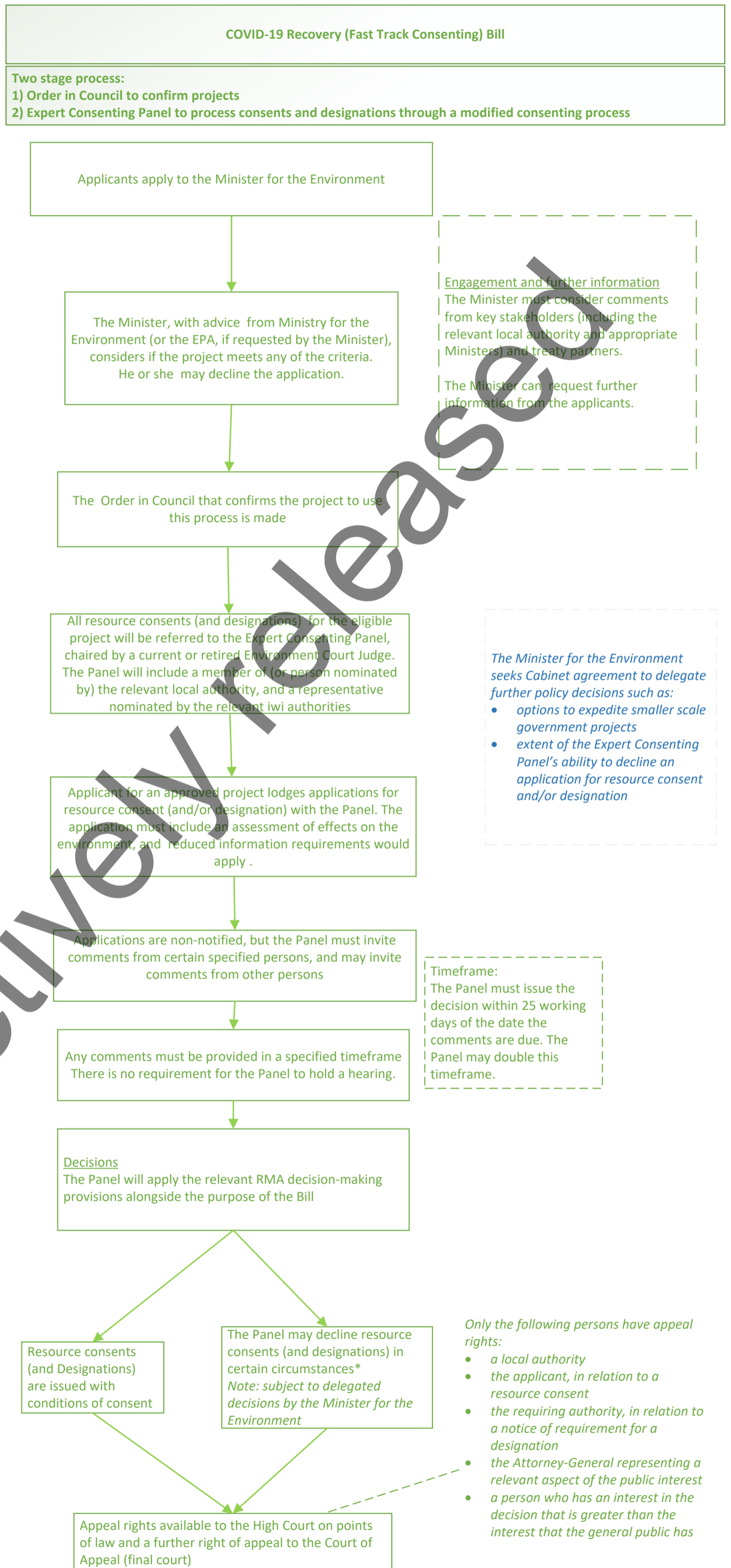
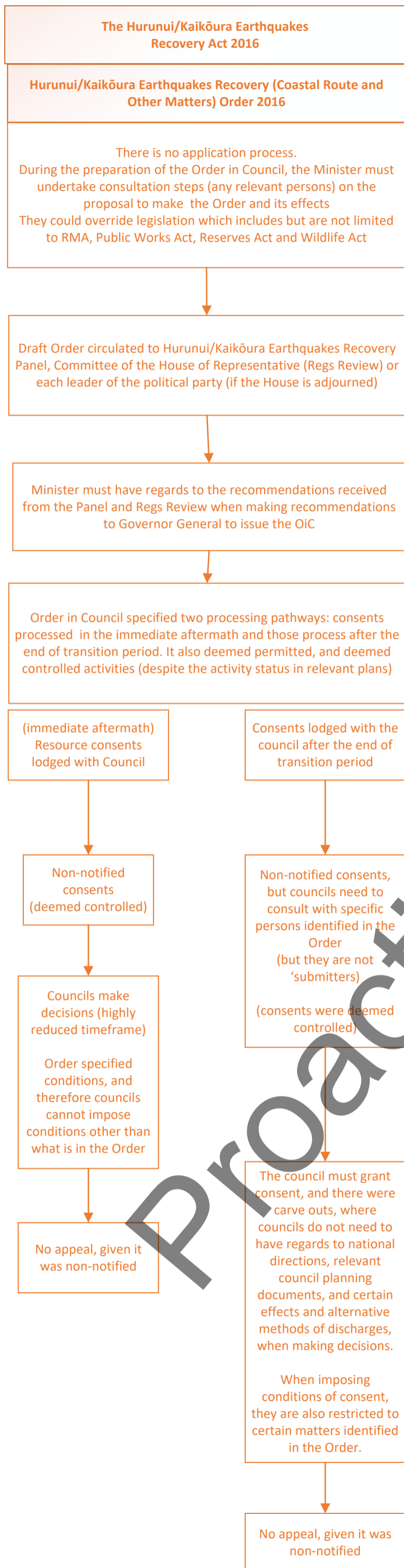
Hon David Parker

**Minister for the Environment**

Proactively released

**Appendix 1 – comparison diagram of the Kaikōura emergency response legislation and the this legislation**

Proactively released



Appendix 2 – Existing RMA approval process options (status quo)

RMA process option	Call-in (matters of national significance)	Direct referral to the Environment Court	Standard resource consent process	Fast-track application (only available for non-notified controlled district land use consents)	Resource consent exemption
<b>Overview</b>	<p>Typically used for large scale, complex or potentially contentious applications.</p> <p>For matters that either are, or part of, a proposal of national significance.</p> <p>The Minister decides to call-in a matter either on their own initiative or on request from an applicant or local authority (an applicant can lodge an application for call-in directly with the Environmental Protection Authority).</p> <p>The Minister decides to refer matter to either a Board of Inquiry or to the Environment Court.</p>	<p>Typically used for large scale, complex or potentially contentious applications.</p> <p>The applicant makes a request to the relevant consent authority to allow application to be determined by the Environment Court in the first instance instead of by the consent authority.</p> <p>Useful for applications which are likely to be appealed to the Environment Court after the council has made a decision.</p> <p>Only applies to notified resource consents, alteration to conditions of a notified resource consent, designations or alteration to a designation.</p>	<p>A summary of a standard resource consent process:</p> <ul style="list-style-type: none"> <li>• application</li> <li>• notification assessment (notified, limited notified, or non-notified) – who should be told about the application and be allowed to submit on it</li> <li>• hearing (if required)</li> <li>• decision</li> <li>• possible appeals on merit to the Environment Court, then points of law appeals can be made to the High, Appeal and Supreme Courts.</li> </ul>	<p>This is very narrowly defined and only for available for resource consents under district plans that are non-notified controlled activity land-uses.<sup>10</sup> This should not be confused with the fast-track process proposed in this legislation which has a much broader application. The process was introduced into the RMA in 2017. It is currently used by only a small number of councils (as indicated by MfE's National Monitoring System data).</p>	<p>A discretionary power for councils to treat an activity as permitted if there is only a marginal or temporary rule breach.</p> <p>Boundary activities are to be treated as permitted if written approval is given by the relevant neighbour(s) and certain information provided to the council.</p>
<b>Decision maker</b>	Board of Inquiry or the Environment Court.	Local authority makes decision to allow direct referral.  Environment Court final decision maker.	Relevant consent authority, which may delegate to an independent hearing commissioner or hearings panel.	Relevant consent authority.	Relevant consent authority.
<b>Appeals</b>	Appeals to the High Court on points of law only.	Appeals to the High Court on points of law only.	<p>No appeals if non-notified. Decision not to notify can be challenged by judicial review.</p> <p>Full appeal rights to the Environment Court for limited and fully notified applications. Further appeals on points of law to the High Court.</p>	No right of appeal. Notification decision can be challenged by judicial review.	No right of appeal, unless the boundary activity is a non-complying activity.
<b>Processing timeframes (excluding appeals)</b>	<p>Board of Inquiry: final decision to be issued within 9 months of EPA notifying the matter.</p> <p>For matters referred to the Environment Court, timeframes are dependent on the Environment Court's case load.</p>	Dependent on the Environment Court's case load. Can be a matter of months.	The RMA sets statutory timeframes of: 20 working days for non-notified resource consents, 60 working days for limited and notified consents with no hearing, 100 working days for limited notified consents with a	<p>Must be processed within 10 working days.</p> <p>Actual processing timeframes in 2018/19 ranged from one to 50 working days (median 9 working days).</p>	<p>Boundary activity applications to be issued within 10 working days.</p> <p>No statutory timeframe for marginal or temporary non-compliance process.</p>

<sup>10</sup> Any regional permits (including land use) or subdivision consents can be 'fast-tracked' under section 87AAC of the RMA. The controlled district land use consent will no longer be 'fast-tracked' if a hearing is held (applicant could request for a hearing) and if the applicant does not opt out of the fast-track process.

RMA process option	Call-in (matters of national significance)	Direct referral to the Environment Court	Standard resource consent process	Fast-track application (only available for non-notified controlled district land use consents)	Resource consent exemption
			<p>hearing, and 130 working days for notified consents with a hearing.</p> <p>Actual processing timeframes for non-notified consents in the 2018/19 period ranged from: 19 to 64 working days (median of 29 working days), and notified consents from 142 to 249 working days (median of 206 working days)<sup>8</sup>.</p>		
<b>Costs</b>	<p>Actual and reasonable costs incurred in running the call-in process can be recovered from the applicant – high financial costs.</p> <p>Full costs for applications considered by a board of inquiry have ranged from \$857,126 (Transmission Gully Plan Change Request) to \$3,040,690 (Basin Bridge).</p> <p>The length of the hearing is a key determinant of cost.</p>	<p>The consent authority can recover actual and reasonable costs before an application is referred to the Environment Court.</p> <p>Once an application is before the Environment Court, the Court is able to recover its costs and expenses from any party. Costs recovered by the Environment Court for direct referral applications have ranged from \$8,264 to \$427,404 (average of \$106,815).</p>	<p>Costs for non-notified resource consents in 2018/19 ranged from \$250 to \$4,000 (median of \$2,150). Costs for a limited notified consent ranged from \$1,000 to \$17,000. Costs for publicly notified consents ranged from \$1,000 to \$41,000 (median \$18,400).</p>	<p>Median cost in 2018/19 was \$850.</p>	

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## Appendix 3 – Canterbury and Hurunui/Kaikōura emergency response legislation

### Consenting processes, information requirements and conditions

#### Hurunui/Kaikōura

The Hurunui/Kaikōura Earthquakes Recovery Act 2016 (HKER Act) authorised the issuing of Orders in Council to “grant exemptions from, modify, or extend any provisions of” a specified list of enactments, including the Resource Management Act 1991 (RMA) and PWA. It enabled Orders in Council made under the Act to modify the application of primary legislation, including imposing consent conditions in the Order in Council. The Order in Council-making process was robust and included providing a draft copy of Orders in Council to the Regulations Review Committee, as well as a specially appointed review Panel.

The details of the modifications to RMA and Public Works Act 1981 (PWA) processes to restore State Highway 1 and rail routes were set out in the Hurunui/Kaikōura Earthquakes Recovery (Coastal Route and Other Matters) Order 2016 (HKER Order). The Order itself set out separate consenting processes, for work carried out by or on behalf of the New Zealand Transport Agency and KiwiRail (“the agencies”):

1. Resource consent for “restoration work”<sup>11</sup> was deemed a controlled activity.
  - a. Reduced information requirements instead of preparing a full assessment of environmental effects; agencies only needed to provide a broad description of the work and its site, a desktop assessment of potential effects, any proposed conditions and description of any consultation undertaken for the work.
  - b. Councils also could not reject the application as incomplete.
2. All these applications were processed by consent authorities (in this instance, Kaikōura District Council and Environment Canterbury) and there were two processing pathways:
  - a. *Consents processed in the immediate aftermath of the earthquakes (during a state of emergency or transition period under the Civil Defence Emergency Management Act)*
    - highly reduced timeframes for granting resource consents
    - limited the consent authority’s ability to impose conditions to the conditions specified in Schedule 1 of the Order
    - no consultation was needed, and these consents were non-notified
    - consent authorities could only modify the conditions specified in Schedule 1 through the following process:
      - the consent authority could recommend amendments to those conditions, which the agency could accept or reject
      - if the agency rejected a recommended amendment, it must identify an alternative amendment and the conditions, as then amended, apply to the consent
    - the consent authority would make its decision on the application, granting the consent, within 3 or 7 working days (depending on the circumstances).
  - b. *Consents processed after the end of the transition period or where the agencies elect not to use the process in (a) above*
    - the imposition of conditions was restricted to matters of control specified in the Order, but could otherwise impose the conditions the councils saw fit

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<sup>11</sup> The HKER Order defined “restoration work” to mean activities that were necessary or desirable to restore, and enhance the safety/resilience of, the Kaikōura road and rail route.

- all consents were non-notified but a specific list of people (including mana whenua, relevant ministers and owners/occupiers of adjacent land) are invited to provide comments
- these persons had 15 working days to provide comments, but they were not 'submitters' and could not appeal under the RMA
- when making its decision, the consent authority:
  - Was not required to "have regard to" the matters in s104(1)(b) of the RMA<sup>12</sup>
  - In regards to discharge consents, was not required to have regard to the matters in s105 of the RMA (relating to certain effects and alternative methods of discharges)
- when making its decision, the consent authority was required to issue a decision within 21 working days of the application being lodged.

#### *Other modifications to consenting processes (and designations)*

- In a similar matter to the 'super fast-track process' for resource consents under 2.a above, the agencies could give notice of a requirement to amend a designation to provide for restoration works. The consent authorities could only impose the designation conditions set out in Schedule 2 of the Order, unless agreed with the agencies.
- The Order also deemed specific activities with relatively minor environmental effects as either permitted activities (meaning no consent was required) or controlled activities (meaning that consent must be granted, with limited discretion over conditions. These activities related to temporary depots, storage and parking facilities.
- Only a consent authority or Minister of the Crown could take enforcement proceedings on the resource consents and designations.

#### *Canterbury Earthquake Recovery Act (CERA)'s Order in Council*

There were seven Orders that were made under CERA in 2011, which relate to modifying the RMA consenting provisions. Most of the seven Orders were relatively minor (i.e. relaxing certain timeframe requirements under the RMA). Only specific Orders will be discussed in this advice.

The Canterbury Earthquake (Resource Management Act Port of Lyttelton Recovery) Order 2011 was less prescribed than the HEKR as discussed above, and has the following key elements:

- deemed reclamation works and port activities to be controlled activities
- resource consents are all non-notified
- specific consultation requirements with certain parties such as Ngāi Tahu, Department of Conservation (DoC), Heritage NZ and others (before lodging an application)<sup>13</sup>
- the applicant must provide a summary of consultation, and response of the applicant to those views and any conditions that the applicant proposes be imposed on the resource consent

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<sup>12</sup> Any relevant provision of a national environmental standard, regulations, a national policy statement, a New Zealand coastal policy statement, a regional policy statement or proposed regional policy statement, or a plan or proposed plan.

<sup>13</sup> It is noted that there is no duty for the applicant to consult before lodgement of resource consent under standard RMA provisions, or response to those feedback – and outline them in an application for resource consent.

- restrict consent authority to only impose conditions on matters such as location, materials used, management of effects of those activities on matters identified in Clause 11 of the Lyttelton Order
- council is required to give notice of its decision on the application no later than 5 days after the application is lodged with consent authority
- Environment Canterbury and Christchurch City Council were the consent authority
- only consent authority or Crown Minister may take enforcement proceeding on the resource consents granted under this Order.<sup>14</sup>

The Canterbury Earthquake (Resource Management Act – Burwood Resource Recovery Park) Order 2011 provided for a streamlined resource consent process for the temporary storage and recycling of earthquake waste at the Bottle Lake Forest Park and adjoining Burwood Landfill.

- Applications to be determined on a non-notified basis. However, after an application is lodged, council must notify certain persons and organisations and invite comments
- the person or organisation may not appeal against the consent authority's decision on the application.

The Canterbury Earthquake (Resource Management Act – Electricity Network Recovery) Order 2011 provided for a streamlined resource consent process for electricity network recovery works already undertaken by Orion New Zealand Limited in Christchurch.

- An electricity network recovery work is to be treated as if it were a controlled activity, despite anything in any regulations, plan, or proposed plan
- councils can impose conditions but to matters restricted in the Order
- applications are determined on non-notified basis
- the resource consent for temporary lines and generators expires on the expiry of this Order if it has not expired before then
- only Christchurch City Council and Minister of the Crown can take enforcement proceedings under the RMA on the resource consent processed under this Order. This also relates to Environment Court declarations.

The Canterbury Earthquake (Resource Management Act) Amendment Order 2011 provides for a streamlined resource consent process for land remediation works (including infrastructure and flood protection works).

- Applications are all non-notified (precluded from public/limited notification)
- the council may consult any person that they consider will be, or is likely to be, or whose property will be, or is likely to be, adversely affected by the activity to which the application relates
- in exercising the discretion to undertake consultation, the council must have regard to the need for the land remediation work concerned to proceed expeditiously
- the council may grant a consent for a non-complying activity that will or may have adverse environmental effects or be contrary to an objective or policy in a relevant plan.

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<sup>14</sup> Note that RMA enables any person to apply for enforcement order (Section 316 of the RMA).

Some of the key elements in other Orders made under CERA can be found below:

- exempting Kate Valley Landfill from resource consent requirements. This was done by enabling the activity to be undertaken without a resource consent under emergency provisions (s 330B of the RMA) for an extended period of time (specified in the relevant Canterbury Earthquake (Resource Management Act) Order 2010)
- the majority of the Orders dis-apply councils' ability to extend timeframes under s37 of the RMA
- only one CERA Order specified a condition. This is however minor as it relates to a condition requiring information to be provided
- one of the Orders deemed certain activities (i.e. temporary accommodation, temporary depots and storage facilities in specified locations) permitted, but specifies that it does not create an existing use rights for the land or structure after the expiry of this Canterbury Earthquake (Resource Management Act Permitted Activities) Order 2011
- none of the Orders required upfront information requirement, or reduced information requirement.

### ***Relevant timeframes***

#### ***Hurunui/Kaikōura timeframes***

- the earthquake – 14 November 2016
- initial earthworks to clear the route began almost immediately after the earthquake, carried out as emergency works under s330/330B RMA
- the Act receives royal assent – 12 December 2016. Hurunui/Kaikōura Earthquakes Recovery Act 2016
- the Order in Council is made – 20 December 2016. Hurunui/Kaikōura Earthquakes Recovery (Coastal Route and Other Matters) Order 2016. Work on drafting the Order in Council progressed while the Act
- works for deemed permitted activities (temporary depots, storage facilities, and parking facilities) could have proceeded as soon as the Order in Council was made
- first resource consent application made under the Order in Council process: 15 February 2017
- first resource consent granted under Order in Council process: 24 February 2017.

#### ***Canterbury timeframes***

- date of the major earthquakes – 4 September 2010 and 22 February 2011
- Royal assent of Canterbury Earthquake Response and Recovery Act 2010 –14 Sept 2010
- up to seven Orders which modified the RMA consenting provisions were developed under CERA in 2011.

### ***Interface with the Public Works Act 1981***

#### ***Hurunui/Kaikōura***

The HKER Order modified the operation of the PWA to remove the requirement for prior negotiations for acquisition of essential land and removed rights of objection to the Environment Court.

#### ***Canterbury***

The Canterbury Earthquake Recovery Act 2011 contained powers to compulsorily acquire land and other acquisition powers.